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No. 73-295

In the Supreme Court of the United States

OCTOBER TERM, 1973

JANE DOE, ET AL., PETITIONERS

v.

PETER BRENNAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 8a-14a) is reported at 344 F. Supp. 964. The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 478 F. 2d 537.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1973, and a petition for rehearing was denied on May 17, 1973 (Pet. App. 15a). The petition for a writ of certiorari was filed on August 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly refused to convene a three-judge court to hear petitioners' contentions that the exclusion of some or all agricultural laborers from full coverage under the Federal Unemployment Tax Act, the Federal Insurance Contributions Act, the Social Security Act, the Fair Labor Standards Act, and the National Labor Relations Act denies migratory agricultural laborers equal protection of the laws.

STATUTES INVOLVED

The pertinent provisions of Section 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C. 3121 and 3306, Section 209 of the Social Security Act, 42 U.S.C. 409, Sections 6 and 13 of the Fair Labor Standards Act, 29 U.S.C. 206 and 213, and Section 2 of the National Labor Relations Act, 29 U.S.C. 152, are set forth in Appendix A, *infra*, pp. 13–14.

STATEMENT

Petitioners, who are migratory farm workers, filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against those provisions of the Federal Unemployment Tax Act, the Federal Insurance Contributions Act, the Social Security Act, the Fair Labor Standards Act, and the National Labor Relations Act that cause their exclusion from federal unemployment compensation, old age insurance, and full minimum wage coverage, and from the federally

guaranteed right to bargain collectively.[1] Petitioners claimed that those provisions denied them equal protection of the laws under the Due Process Clause of the Fifth Amendment, and they requested the convention of a three-judge court.

The district court denied petitioners' request for convention of a three-judge court and dismissed their complaint on the ground that the issue they sought to raise had been decided against them in *Romero* v. *Hodgson*, 403 U.S. 901, affirming 319 F. Supp. 1201 (N.D. Calif).[2] The court of appeals affirmed on the same ground.

ARGUMENT

Petitioners here do not directly challenge the holding below on the merits of their constitutional claims. They challenge instead the determination by the district court that those claims are not sufficiently substantial to warrant the convention of a three-judge court. But, as we shall show, their claims were foreclosed by the reasoning underlying *Romero* v. *Hodgson*, *supra*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548, and *Helvering* v. *Davis*, 301 U.S. 619, and therefore were properly treated as insubstantial by the courts below.

1. Petitioners' claim with respect to unemployment compensation coverage is indistinguishable from the

[1] Petitioners also challenged the validity of certain state laws. That challenge does not affect the federal respondents and we do not discuss it further here.

[2] The district court therefore found it unnecessary to reach the question whether petitioners' unemployment compensation and social security claims were barred by the Anti-Injunction Act, 26 U.S.C. 7421.

one considered and rejected in *Romero*, and they make little effort to distinguish it.[3] Petitioners contend instead (Pet. 8–12) that, as a summary affirmance, *Romero* should not be controlling in future litigation; they claim that the decision below, in giving controlling weight to a summary affirmance by this Court, conflicts with *Dillenburg* v. *Kramer*, 469 F. 2d 1222 (C.A. 9), and *Gibson* v. *Berryhill*, 411 U.S. 564.

There is no conflict. In *Dillenburg* the Ninth Circuit did suggest in passing (469 F. 2d at 1225) that a summary affirmance could be given little precedential weight, but that remark was mere *dictum:* the court went on to conclude that the case before it was in any event distinguishable from the summary affirmance relied upon by the appellee there. *Gibson* is actually

[3] Petitioners do suggest two differences, but these have little substance. They contend first (Pet. 12–14) that coupling an unemployment compensation claim with their claims relating to old age insurance, the minimum wage, and collective bargaining, changes the theory of the equal protection argument to one of "a pattern or practice of unequal treatment cutting across the entire spectrum of American social legislation" (Pet. 13). We fail to see how the broadening of equal protection allegations to other statutes can affect the question whether petitioners' exclusion from unemployment compensation coverage itself has a rational basis; each statute must be considered on its own merits. Petitioners also contend (Pet. 14–15) that the traditional rational basis test has been discredited since *Romero*. In fact, however, this Court has recently strongly reaffirmed the principle that economic and tax statutes, such as the ones involved here and in *Romero*, must be sustained when they are shown to have a rational basis. See *San Antonio School District* v. *Rodriguez*, 411 U.S. 1; *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356; *Jefferson* v. *Hackney*, 406 U.S. 535. The standard of review applied in *Romero* is thus also applicable here.

contrary to petitioners' contention: the Court there acknowledged (411 U.S. at 576) that the precedential scope of a summary affirmance was often difficult to measure, but the Court's reasoning strongly implied that a summary affirmance would control subsequent cases involving the same issue. This, of course, is the historic and well-established view. See, *e.g., United States ex rel. Epton* v. *Nenna,* 446 F. 2d 363, 366 (C.A. 2), certiorari denied, 404 U.S. 948. See generally, Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent,* 52 Boston U.L. Rev. 373 (1972). "Votes to affirm summarily * * * are votes on the merits of a case * * *." *Ohio ex rel. Eaton* v. *Price,* 360 U.S. 246, 247 (memorandum opinion of Mr. Justice Brennan). Petitioners offer no valid reason why such decisions should not be followed by the lower federal courts.

In any event, as we demonstrate below, the rationale of *Romero* and other decisions establishes the insubstantial nature of petitioners' constitutional claims, whether or not *Romero* itself is entitled to controlling precedential weight.

2. Throughout the history of this nation, the special characteristics of agriculture as an industry and as a way of life have led Congress to accord it special legislative treatment. Agriculture has historically been dominated, and remains largely characterized, by small family farms. Moreover, it is uniquely vulnerable: producers are dependent upon the vagaries of weather, soil condition, crop disease, and insect plague, and

they must sell in a competitive market the movements of which they cannot predict, let alone control. Yet the continued prosperity of the farming industry is vital to the well-being of the nation as a whole. For these and other reasons, Congress and the state legislatures have treated agriculture differently from other industries: a catalogue of farm legislation, or of general legislation excluding the world of the farm from its operation, would embrace a substantial portion of the nation's legislative history. See, *e.g.*, *Aero Transit Co.* v. *Georgia Commission*, 295 U.S. 285, 290–293; *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89.

The agricultural labor market also possesses special characteristics that distinguish it from the industrial labor market. Farm work tends to be predominantly seasonal and irregular. Substantial segments of the farm labor force are migrant, casual, intermittent, or part-time. The terms and conditions of employment, for obvious reasons, necessarily vary greatly from those prevailing in industry and commerce.

a. In view of these general considerations, the reasons for excluding agricultural labor generally from the federal unemployment compensation program (see 26 U.S.C. 3306(c)(1))[4] are apparent. That exclusion accomplishes two related congressional objectives.

[4] As a technical matter, federal law does not exclude agricultural workers from unemployment compensation coverage; it merely exempts their employers from the federal unemployment tax. The structure of the tax therefore provides no incentive for inclusion of farm workers in state unemployment compensation programs, and most states exclude such workers from coverage.

First, it provides some tax relief for farmers and saves them from the elaborate paperwork requirements that compliance with the federal unemployment tax would entail; in this sense, the exclusion is an indirect subsidy to the farming industry and this Court has upheld a similar exclusion under state law on that ground. *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 512–513. Second, the exclusion of intermittent or seasonal employees is necessary to ensure the fiscal stability of an unemployment compensation program; extending coverage to such workers might result in heavy drains on unemployment insurance funds. See Hearings before the House Committee on Ways and Means on the Economic Security Act, 74th Cong., 1st Sess., pp. 35–36. Cf. *Dandridge* v. *Williams*, 397 U.S. 471, 477–480. Such considerations long ago led this Court to uphold, as having a rational basis, the very exclusion petitioners now challenge. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583–585. This Court's decision in *Romero* merely reaffirmed the vitality of *Steward Machine*.

But the needs of farm laborers are still very much before the Congress. In March of this year, acting pursuant to Section 141 of the Employment Security Amendments of 1970, Pub. L. 91–373, 84 Stat. 695, 705, the Secretary of Labor issued to Congress a report concluding that the extension of unemployment compensation coverage to farm workers is now economically feasible. See Appendix B, *infra*, pp. 15–17. A bill, H.R. 8600, 93d Cong., 1st Sess., has now been introduced, with Administration support, to provide unemployment in-

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surance for all farm laborers who work for employers paying more than $5,000 in annual cash remuneration or employing at least four employees for at least one day in each of 20 weeks per year.

The carefully drawn provisions of this bill take into account the complex economic effects that its passage would have on agricultural employers and the fiscal stability of unemployment insurance funds. Change in this area should properly come as a result of such refined legislation and not from the broad-brush judicial intervention sought by petitioners. In the meantime, the present law remains constitutionally valid: Congress has not exceeded its powers by placing agricultural labor in a separate category with regard to the unemployment tax and then seeking—and giving deliberate consideration to—added information and analysis before taking further action.

b. Similar considerations support the validity of the other federal laws challenged by petitioners.

i. As originally enacted, the Social Security Act and the Federal Insurance Contributions Act excluded all farm workers from the benefits—and costs—of old age insurance. This exclusion was upheld as valid in *Helvering* v. *Davis,* 301 U.S. 619, 635, 646.[5] Like the similar exclusion from the unemployment tax, exclusion of farmers from the social security tax protected their precarious economic position and saved them from having to comply with extensive bookkeeping require-

[5] The respondent there had argued that "[i]t is capricious to deny the over sixty-five benefits to farm laborers and to relieve their employers from an imposition placed on other employers." Resp. Br. 41, *Helvering* v. *Davis*, No. 910, October Term 1936.

ments; the Court in fact decided this question in *Helvering* v. *Davis* merely by referring to *Steward Machine.*

But as the conditions in the agriculture industry have changed, Congress has subjected the agricultural labor exclusion to close and continuing scrutiny. The result has been a steady narrowing of that exclusion, undertaken with due regard to the paperwork and financial burdens thereby imposed on the farmers themselves.[6] At present, old age insurance coverage extends to all agricultural workers who are paid more than $150 per year by a single employer or are employed by a single employer for more than 20 days. 26 U.S.C. 3121(a)(8); 42 U.S.C. 409 (h). This evolution of the old age insurance program demonstrates that Congress, in cautiously evaluating the administrative and economic costs of expanded coverage and weighing them against the legitimate needs of farm workers, has continued responsibly to balance the respective interests in the manner approved by this Court in *Steward Machine* and *Helvering* v. *Davis.*

ii. Agricultural labor was denied the federally protected right to bargain collectively (see 29 U.S.C. 152 (3)) for several valid reasons: many family farms employ small numbers of workers except in peak work periods, and the extension of collective bargaining to such farms would be seriously burdensome to the farmers; the intermittent, part-time, seasonal, and cas-

[6] See, *e.g.*, S. Rep. No. 1669, 81st Cong., 2d Sess., pp. 2, 10–13; H. Rep. No. 1698, 83d Cong., 2d Sess., pp. 1–4, 9–10; S. Rep. No. 1987, 83d Cong., 2d Sess., pp. 1–2, 7–8; S. Rep. No. 2133, 84th Cong., 2d Sess., pp. 1–2, 11–12.

ual nature of so much agricultural labor, and the small size of most agricultural employers, would complicate the administration of collective bargaining in that industry. See 79 Cong. Rec. 9720–9721; S. Rep. No. 573, 74th Cong., 1st Sess., p. 7. The relevant considerations are similar to those pertaining to the unemployment and old age insurance taxes. See generally Morris, *Agricultural Labor and National Labor Legislation,* 54 Calif. L. Rev. 1939, 1945–1956 (1966); Comment, *Legislation and Agriculture Labor,* 1949 Wis. L. Rev. 563, 570–571. Cf. *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.,* 169 F. 2d 571, 578 (C.A. 6), certiorari denied *sub nom, Foreman's Assn. of America* v. *Edward G. Budd Mfg. Co.,* 335 U.S. 908.

iii. The Fair Labor Standards Act, which excludes many classes of employees from any minimum wage coverage (see 29 U.S.C. 213(a)), provides limited coverage for farm laborers: only workers on farms employing more than 500 man-days of agricultural labor during any calendar quarter of the preceding year are granted minimum wage protection,[7] and the minimum wage schedule for such agricultural workers is lower than for laborers in most industries. 29 U.S.C. 206(a)(5) and 213(a)(6). The purpose of the restriction of the Act's requirements to larger farming employers is obvious—to maintain the economic viability of the family farm, and to avoid the administrative difficulties inherent in policing compliance by such small farms. The lower minimum wage schedule results from

[7] Presumably this provision grants greater protection to migratory agricultural workers, such as petitioners, who may typically work on larger farms, than to other agricultural workers.

legislative concern for the broader economic needs of the entire farming industry. See *Florida Fruit & Produce* v. *United States*, 117 F. 2d 506, 508 (C.A. 5). In short, similar considerations pertain to all the statutes attacked by petitioners. See Comment, 1949 Wis. L. Rev., *supra*, at 572–574.

Congress has attempted over the years to extend the statutory benefits to the maximum extent economically feasible, and has provided coverage for employees of large "agribusiness enterprises" whose situation most closely parallels that of industrial firms. See S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 2–4, 9–10. This measured and deliberate congressional extension of social welfare legislation to agricultural workers is slower than petitioners would like, but the statutory pattern so far evolved by Congress cannot be said to lack rationality. This conclusion is so clear that consideration by a three-judge court was unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1973.

APPENDIX A

Sections 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C. 3121 and 3306, provide in pertinent part as follows:

> Section 3121(a). For purposes of [the old age and survivors insurance tax], the term "wages" means all remuneration for employment * * * except that such term shall not include— * * *
>
> (8)(A) remuneration paid in any medium other than cash for agricultural labor; (B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless (i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or (ii) the employee performs agricultural labor for the employer on 20 days or more during such year for cash remuneration computed on a time basis; * * *.
>
> Section 3306(c). For purposes of [the federal unemployment tax], the term "employment" means any service performed * * * except—
>
> (1) agricultural labor * * *.

* * * * *

Section 209 of the Social Security Act, 42 U.S.C. 409, provides in pertinent part as follows:

> For the purposes of [the old age and survivors insurance program], the term "wages" means remuneration * * * except that, * * * such term shall not include— * * *
>
> (h)(1) Remuneration paid in any medium other than cash for agricultural labor;
>
> (2) Cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless (A) the cash remuneration

paid in such year by the employer to the employee for such labor is $150 or more, or (B) the employee performs agricultural labor for the employer on 20 days or more during such year for cash remuneration computed on a time basis; * * *.

* * * * *

Sections 6 and 13 of the Fair Labor Standards Act, 29 U.S.C. 206 and 213, provide in pertinent part as follows:

Section 6(a). Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than * * * $1.60 an hour * * *, except as otherwise provided in this section; * * *

(5) if such employee is employed in agriculture, not less than * * * $1.30 an hour * * *.

Section 13(a). The provisions of [Section 6] * * * shall not apply with respect to— * * *

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor * * *.

* * * * * * *

Section 2 of the National Labor Relations Act, 29 U.S.C. 152, provides in pertinent part as follows:

When used in this Act— * * *

(3) the term "employee" * * * shall not include any individual employed as an agricultural laborer * * *.

APPENDIX B

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 15, 1973.

Hon. CARL ALBERT,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: I am transmitting herewith the results of this Department's study of the effect and impact of extending unemployment insurance coverage to agricultural labor. The study was undertaken pursuant to the express direction in section 906(a)(2) added to the Social Security Act by the Employment Security Amendments of 1970 (P.L. 91-373).

The study, conducted under the supervision of the Manpower Administration's Unemployment Insurance Service, is the largest of its kind ever conducted. With the cooperation of 12 land-grant colleges and State employment security agencies, the study spans 18 States and about 50 percent of the Nation's hired farm work force. For 15 States, the study was done primarily by a research consortium of agricultural economists in the land-grant colleges; the results for those States are summarized in one volume. In the other three States, the studies were conducted by the State employment security agencies, and each such agency has issued its own report. (A listing of the participating land-grant colleges is enclosed.)

Based on the study we estimate that extension of the unemployment insurance laws to large farm employers (those with four workers in 20 weeks or a

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quarterly payroll of $5,000) in 1969 would have added about 55,000 employers and 770,000 farm jobs nationwide.

The study results demonstrate that: (1) relatively few large farm employers account for a substantial portion of the farm work force, (2) the costs of providing unemployment insurance protection to farm workers are not prohibitive either to farm employers or to the UI system as a whole. In most States the agricultural sector would be self-supporting, that is, contributions from farm employers would, on the average, be sufficient to cover the benefits paid to involuntarily unemployed farm workers, and (3) employers currently subject to the UI tax would be insignificantly affected in 16 of the 18 States studied, and not greatly affected in California and Florida with respect to increased taxes. In California, benefit costs as a percent of taxable wages would increase from 1.96 percent to 2.15 percent; in Florida, from .43 percent to .55 percent.

The package transmitted includes, for each member of the House, a copy of the summary report on the 15 States and the separate reports for California, Minnesota and Washington.

Sincerely,

PETER J. BRENNAN,
Secretary of Labor.

Enclosures.

A Listing of the Land-Grant Colleges:

University of Connecticut.
University of Delaware.
University of Florida.
University of Maryland.
University of Massachusetts.
University of New Hampshire.
Rutgers—The State University (New Jersey).
Economic Research Service, U.S.D.A., Cornell University (New York).
Ohio State University.
The Pennsylvania State University.
Texas A&M University.
University of Vermont.

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